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Nos. 86-497 and 86-531

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

AGENCY HOLDING CORP., et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

On Writs of Certiorari to the Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE FOR A.J. CUNNINGHAM PACKING CORP., CHICAGO DRESSED BEEF CO. INC. CONTINENTAL FOOD PRODUCTS, INC., FLORENCE BEEF COMPANY, AND PIERCE TRADING COMPANY IN SUPPORT OF RESPONDENT

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I. THE INTEREST OF THE AMICI

Amici Curiae, A.J. Cunningham Packing Corp., Chicago Dressed Beef Co., Inc., Continental Food Products, Inc., Florence Beef Company and Pierce Trading Company, are

plaintiffs in litigation pending against amici curiae, Congress Financial Corporation ("Congress") and Philadelphia National Bank ("PNB"). The Complaint in that litigation sets forth claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 *et seq*. (1982). An appeal by amici in that litigation presented some of the same statute of limitations issues as those presented for review by the instant writs of certiorari and was argued and decided in the United States Court of Appeals for the Third Circuit concurrently with the decision here for review, *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 792 F.2d 341 (3d Cir. 1986). *See A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir. 1986). Amici's RICO action is still pending in the district court and will necessarily be affected by any decision by the Supreme Court concerning the appropriate selection of a limitations period for RICO claims.[1]

II. SUMMARY OF ARGUMENT

In *Wilson v. Garcia*, 105 S.Ct. 1938 (1985), this Court required uniform characterization of federal civil rights damage claims for purposes of "borrowing" the most appropriate state period of limitation. This requirement was based on: (1) the fact that the values at stake were uniquely and overwhelmingly federal in nature; (2) the fact that Congress was unlikely to have contemplated the wide diversity of claims which ultimately came to be embraced by civil rights actions; and (3) the considerations of practicality and predictability inherent in eliminating litigation on a case-by-case basis as to how to characterize the numerous and diverse types of civil rights claims for limitations purposes.

The RICO statute does not implicate the kind of uniquely federal values which are at stake in civil rights cases. Moreover, in view of the statutory definition of a RICO violation Congress clearly did contemplate that the RICO damage remedy would encompass numerous and diverse kinds of conduct. Finally, a case-by-case approach to borrowing limitations periods from

1. A written consent by all parties to the filing of the instant brief amici curiae has been separately filed with the Court.

state law for purposes of RICO does not, from a practical standpoint, represent the same kind of confusing and time-consumming process as it did in the area of civil rights. Given the reality acknowledged in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275 (1985), that in excess of 80 percent of RICO litigation involves fraudulent conduct, most limitations questions under RICO are simply resolved by borrowing the fraud limitations provisions provided by state law.

However, if considerations of convenience, predictability, and practicality warrant uniformity of resolution for all RICO limitations questions, this Court should apply the four year limitations period given by Section 4 of the Clayton Act, 15 U.S.C. §15, under the rule recently set down by the Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) because the treble damage remedy given by the Clayton Act forms a closer analogy to the treble damage remedy given by RICO than any available state statutes.

If uniformity is desirable and if the Clayton Act's four year limitations period is not one which may appropriately be borrowed, this Court should characterize RICO claims as actions for fraud or, alternatively, as actions for violation of a statute. Such a characterization would best reflect the legislative contemplation that RICO's private damage remedy would be used primarily as redress for fraudulent behavior or Congress' expressed intent that the remedy apply only where there was proof of violations of enumerated state and federal statutes.

Characterizing RICO claims as actions for injury to "tangible and intangible property" would not accomplish *Wilson's* goal to eliminate time-consuming and expensive litigation over limitations questions but would, in fact, exacerbate that problem. This is because the limitations schemes of the states specify different periods of limitation depending on the type of intangible interest damaged and the manner of the infringement. Characterizing the RICO action as a claim for penalty or forfeiture would be inappropriate because many states, including Pennsylvania, define limitations periods for penalty and forfeiture actions to exclude damage claims such as those arising under RICO.

III. ARGUMENT

A. An Introduction: The *Wilson v. Garcia* methodology

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.* (hereinafter "RICO") does not set forth a specified period of limitations which applies to claims for damages arising under the Act. Since that is the case, the federal period of limitations should generally be the period of limitation which applies to the most analogous state cause of action, so long as it is appropriate to effectuate the remedial purposes of the federal enactment. *See e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). *But see, pp.* 8-10, *infra*. Prior to this Court's decision in *Wilson v. Garcia*, 105 S.Ct. 1938 (1985) (hereinafter "*Wilson*"), this had required a particularized analysis of the facts and circumstances involved in each federal claim on a case-by-case basis in order to identify the state limitations period most precisely analogous to that claim. *Wilson* explicitly changed that for cases arising under the civil rights laws. The question presented by the Third Circuit's opinion here is whether *Wilson*, by analogy, also requires a departure from a facts and circumstances approach to limitations questions in cases arising under RICO.

Wilson involved a federal civil rights claim under 42 U.S.C. §1983 in which this Court undertook to decide what period of limitations to apply to the claim. The Court found that in its analysis of this issue, Section 1988 of the civil rights statute "directed" it to follow a three step process:

> "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil rights] statute into effect.' If no suitable federal rule exists, courts undertake the second step by considering application of the state 'common law, as modified and changed by the Constitution and statutes' of the forum state. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States."

Wilson, 105 S.Ct. at 1942-43 (citations omitted.)

Finding that there was no federal rule on point, the *Wilson* decision observed that the case primarily involved the second step in the process — the selection of the most appropriate or analgous state statute of limitations to apply to the Section 1983 claim before it. *Id.* at 1943. This selection process was understood to be composed of two discrete inquiries: (1) whether all civil rights claims under Section 1983 should be characterized in the same way or differently depending on the varying factual circumstances and legal theories present in each individual case; and (2) if a uniform characterization was appropriate, what it should be.

Wilson concluded that all civil rights claims should be characterized in the same way for limitations purposes. There were two considerations which supported this conclusion. The first was one of policy and practicality. Here, Justice Stevens observed that the behavior potentially violative of the civil rights statute encompassed so many "numerous and diverse topics and sub-topics" that an individual "facts and circumstances" approach to the limitation question would inevitably breed uncertainty and time-consuming litigation that was foreign to the central purposes of Section 1983. *Id.* at 1945-46. The second consideration supporting a uniform characterization of Section 1983 claims for limitation purposes was one of statutory construction. It was highly unlikely, this Court reasoned, at the time Section 1983 was enacted "that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace." *Id.* at 1946. Thus, the decision concluded that it was likely that Congress expected uniformity and simplicity in the judicial treatment of such claims.

Having determined that all civil rights claims should be uniformly characterized for limitations purposes, the opinion concluded by holding that they should be characterized as claims for personal injuries rather than statutory torts subject to state "catchall" statutes of limitation. There were three distinct reasons supporting this conclusion. First, the legislative history underlying the civil rights statute revealed that the legislature was focusing on violations of civil rights involving personal injuries. *Id.* at 1947-48. Thus, the opinion reasoned, it was likely that

Congress viewed the remedy it was creating as one primarily for such personal wrongs. *Id*. Second, at the time Section 1983 was enacted there was a scarcity of statutory tort claims making it unlikely "that Congress would have intended to apply the catch-all periods of limitations for statutory claims that were later enacted by many states." *Id*. at 1948. Finally, because personal injury actions were so common in all states, it was unlikely that the limitations period applicable to them could be fixed in such a way as to discriminate against federal claims. *Id*. at 1949.

B. It is Dubious that *Wilson* Supports a Uniform Characterization of RICO Claims for Limitations Borrowing Purposes.

The applicability of the *Wilson v. Garcia* methodology to a determination of the appropriate period of limitations for civil RICO claims is doubtful. In the first place, the *Wilson* analysis was "directed" by a civil rights statute, 42 U.S.C. §1988, which has absolutely no application to non-civil rights claims such as those arising under RICO.

Secondly, even if the *Wilson* analysis is properly brought to bear by analogy, the critical factors relied upon by *Wilson* to require the uniform characterization of a federal civil rights claim for purposes of "borrowing" the analogus state period of limitations are attenuated in the RICO area. *Wilson* found that such uniformity in characterization was required because the values at stake in the litigation of a Section 1983 civil rights claim were constitutional in dimension, and uniquely and overwhelmingly federal in nature. However, the values protected by the RICO enforcement mechanism are neither consitutional in dimension nor wholly federal in nature.[2] Thus, the policy rational which called for uniformity in treatment of the uniquely federal civil rights action is not compelling in the field of RICO litigation.

2. The provisions of RICO [illegible] unlawful a pattern of predicate acts which are not only indictable under federal law but which are "chargeable under state law and punishable by imprisonment for more than one year." *See*: 18 U.S.C. §1961(1).

Moreover, the considerations of statutory construction relied upon by *Wilson* are absent here, even by analogy. A central consideration in the *Wilson* decision was the view that in enacting the civil rights laws Congress did not expect that Section 1983 would apply to "a wide diversity of claims." This supported the conclusion, as a matter of statutory intrepretation, that the legislature expected uniformity in the treatment of such claims. As this Court noted in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct.3275, 3286 (1985) and as demonstrated by Petitioners in their briefs here, the RICO statute makes unlawful a multiplicity of specific predicate acts provided they are sufficiently related to constitute a statutorily defined pattern. These involve such diverse behavior as murder, obstruction of justice, wire fraud, mail fraud, unlawful welfare fund payments, extortion, and more. See 18 U.S.C. §1961(1). Thus, unlike the civil rights statutes, it cannot even reasonably be argued that Congress did not expect the RICO remedy to apply to the "wide diversity of claims that the remedy would ultimately embrace." That diversity is clearly created by the statutory language itself. Thus, the principle of statutory construction which warranted uniform characterization of civil rights claims under *Wilson* is altogether lacking for RICO claims.

Whether this Court should require uniform characterization of RICO or any other federal claim based solely on the practical considerations referred to in *Wilson* is dubious. Moreover, these practical considerations are attenuated in the RICO area. It is true that RICO, like the civil rights statute, potentially encompasses "numerous and diverse topics" with analogies to different causes of action having different periods of limitation under state law. However, unlike the civil rights area, this potential diversity is largely theoretical and not experienced as part of the reality of RICO litigation. That reality, recognized by this Court's *Sedima* decision, is that most RICO actions are predicated on acts of common law or securities fraud for which analogies to state law are clear and direct. *See Sedima v. Imrex, supra*, 105 S.Ct. at 3287 n. 16. Accordingly, even under the case-by-case approach most limitations questions arising in RICO cases can readily be resolved by looking to the limitations period afforded

by the states to claims for securities fraud and common law misrepresentation.

C. If Uniform Treatment of RICO Claims is Appropriate, the Court Should Apply the Period of Limitations Given by the More Nearly Analogous Provisions of the Clayton Act.

If a monolithic approach to the characterization of RICO claims is appropriate because of the practical considerations specifically identified in *Wilson* then, we submit, these practical considerations weigh in favor of focusing on the first rather than the second step of the three step process identified in *Wilson*. It will be recalled that *Wilson* held that the first step in the process of determining what limitation period to apply to a federal claim is to ascertain whether any federal principle should apply the appropriate rule of decision.

In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977), this Court recognized that it "has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Id.* at 367. It pointed out that "[s]tate legislatures do not devise their limitations period with national interests in mind," and reiterated that [a]lthough state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Id., quoting Johnson v. Railway Express Agency*, 421 U.S. 454, 465, (1975). And in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Court set forth the circumstances under which a limitations period given by an express federal provision should be borrowed in lieu of any state analogue:

> "[W]hen a rule from elsewhere in federal law provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making, we have not hesitated to turn away from state law."

Id. at 171-72. *See also, McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (federal limitations period applied to seaworthiness action under General Maritime Law rather than state statute governing personal injury); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977) (federal law applied to EEOC enforcement action).

The federal antitrust laws manifestly provide a closer analogy to the civil RICO claim than any of the myriad available state statutes. *See A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 338-341 (3d Cir. 1986) (concurring opinion of Judge Sloviter, incorporated by reference in the Third Circuit Malley-Duff opinion); *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporate Banking and Business Law* at pp. 385-387 (March 28, 1985); *State Farm Fire & Casualty Co. v. Estate of Canton*, 540 F.Supp. 673 (N.D. Ind. 1982). Both the civil remedy given by Section 4 of the Clayton Act, 15 U.S.C. §15, and that given by the civil enforcement provisions of RICO, 18 U.S.C. §1964(c), provide for the same thing in the same language — the recovery of "three-fold damages and the costs of suit including a reasonable attorney's fee." These remedies, treble damages and the recovery of counsel fees, are foreign to the remedial tort schemes of most states. Moreover, the injury and causation required to invoke the damage remedy is described in both the Clayton Act and in RICO in the same language as injury to a person "in his business or property by reason of" a violation of the relevant law. *Compare:* 15 U.S.C. §15 with 18 U.S.C. §1964(c). Finally, the legislative history underlying the enactment of the civil RICO remedy reveals that Congress not only viewed RICO as analogous to the Clayton Act, but that the Clayton Act served as the model for the civil provisions of RICO. During hearings on S. 30 before the House Judiciary Committee, representative Steiger proposed the addition to RICO of a private treble damages action "similar to the private damage remedy found in the antitrust laws. . . ." "Hearings on S. 30 and the related proceedings before Subcommittee No. 5 of the House Committee on the Judiciary," 91 *Cong. 2d*

Sess. at 520 (1970). And the American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act." *Id.* at 543-544, 548, & 549. Summarizing this legislative history, this Court said in *Sedima:* "The clearest current in that history is the reliance on the Clayton Act model," a model significantly different than the tort schemes of the states. *See: Sedima, S.P.R.L. v. Imrex Co., Inc., supra,* 105 S.Ct. at 3282. Accordingly, the first aspect of *DelCostello* — the presence of a closer analogy in federal law than available state statutes — is present.

The second aspect of *DelCostello,* the requirement that the "the federal policies at stake and the practicalities of the litigation" make a uniform statute more desirable must be taken as a given, for if those policies and practical considerations do not exist in sufficient strength, the Court could not even consider applying a uniform period of limitations under *Wilson v. Garcia.* Selection of Section 4 of the Clayton Act as the period of limitations for RICO claims would ensure absolute predictability of result and true uniformity throughout the nation, as well as precluding forum shopping for the forum state with the longest period of limitation applicable to the analogous state claim.

Accordingly, we submit, if the federal policies and practicalities implicated by RICO litigation demand the application of a uniform period of limitations, the court should apply the four year limitations period provided by the Clayton Act.

D. It is Inappropriate to Analogize the RICO Cause of Action to Claims for Injury to "Tangible or Intangible Property" or to Actions to Recover a Civil Penalty or Forfeiture.

Assuming that the uniform characterization of RICO claims is mandated by *Wilson v. Garcia* and that *DelCostello* is not found to warrant application of the Clayton Act's four year period of limitations, one must proceed to the third step of the *Wilson* analysis and actually characterize the RICO claim.

1. The Property Statute

Petitioners and amici, Congress and PNB, suggest that Pennsylvania's two year limitations statute, 42 *Pa. C.S.A.* §5524 (Purdon 1981), should have been selected by the Third Circuit as the period of limitation to uniformly apply to RICO claims arising in Pennsylvania. The argument made in support of this suggestion is twofold. First, it is asserted that the choice is appropriate because Section 5524 covers conduct which may be analogized to the greatest number of "predicate acts" which, when they occur in statutory proximity, make up the pattern of racketeering activity proscribed by RICO. Second, it is urged that since Section 5524(3) applies to "an action for taking, detaining or injuring personal property" it is most analogous to the RICO private cause of action which allows recovery for "injury to business or property." Each argument is seriously flawed.

With regard to the assertion that the courts should borrow the limitations period given by Section 5524, in general, because it covers conduct which can be analogized to the greatest number of RICO predicate acts, this is plainly not what *Wilson* contemplates. Under that decision, the court is required to actually categorize the RICO claim as one specific type of claim for application of the most analogous state statute. *Wilson* expressly eschewed any approach to the limitations question involving a determination of which state statute governed the greatest number of acts potentially encompassed by the federal statute.

Moreover, the proposal is utterly unworkable and would pose even greater difficulties than an approach to the limitations question based on the facts and circumstances of an individual case. To apply the concept, one would have to determine which state claim was most analogous to each and every one of the 27 predicate acts specified by the RICO statute and then make a mathematical computation of which state statute of limitations applied to the greatest number of these acts. This would necessarily involve an individual characterization of each of the actions subject to the federal statute and a search for an analogous statute of limitations in state law which would produce a deluge of unnecessary and conflicting adjudications concerning the proper

characterization of each of the 27 predicate RICO acts in direct contravention of the directives of *Wilson*.

Further, because of the differing limitations schemes of the various states, the approach would produce the absurd result that the limitations period for RICO claims would vary from state to state based entirely on the fortuitous arithmetic circumstance of which state period of limitations happened to cover the greatest number of RICO predicate acts. It cannot be assumed that Congress intended such a mechanistic approach and such an absurd result. Thus, it must be rejected out of hand.

The argument in support of uniformly borrowing the two year limitations provisions of Section 5524 (3) is also inconsistent with the teachings of *Wilson* and unworkable. RICO affords a remedy not only for the taking of tangible personal property, but plainly extends its damage remedy to all commercial losses which occur as a result of the varied actions which may go to make up a pattern of racketeering activity. *E.g., Sedima v. Imrex Co., Inc., supra,* 105 S.Ct. at 3285-86. The states of our Union do not simply label all such commercial rights as "property" and apply a uniform period of limitation to tortious conduct which infringes such rights. Rather, the states define different periods of limitation by expressly distinguishing between both the type of interest infringed as well as the type of conduct causing that infringement. For example, in Pennsylvania during the period at issue here a "fraudulent" taking of tangible or intangible property — activities most analogous to that involved in most of the RICO actions brought — was subject to a six year limitations period. *See A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir. 1986). An action involving the taking of property through securities fraud — the second most popular predicate for RICO actions — was subject to a three year limitations period. 70 P.S. §1-504(a) (Purdon, 1981). Actions for harm caused by statutory violations were subject to a six year limitations period. *See* 42 *Pa. C.S.A.* §5527 (Purdon, 1981); *Webster v. Great American Insurance Co.*, 544 F.2d 609 (E.D. Pa. 1982). Actions for abridgement of intangible property interests through tortious interference with contractual relations

were subject to a two year limitations period. *See Home for Crippled Children v. Erie Insurance Exchange*, 30 D & C 3d 357 (1982), *aff'd mem.*, 329 Pa. Super. 601, 478 A.2d 84 (1984). Actions resulting in business loss as a result of disparagement, business lible and the like were subject to a one year limitations period. *See* 42 *Pa. C.S.A.* §5523(1). Thus, to say that RICO claims should be analogized to claims for injury to "tangible and intangible property interests" under state limitations law is to say nothing. In order to choose among the varying periods of limitation prescribed by state law, a further determination would still be required as to what kind of property and what kind of taking could most appropriately be analogized to the RICO claims. Accordingly, characterizing the RICO claim as an action for injury to tangible or intangible property would not serve to achieve the uniformity and predictability of result contemplated by *Wilson*. To the contrary, it would continue to invite litigation, conflicting decisions and uncertainty as to the appropriate characterization of RICO claims for limitations purposes. Thus, it must be rejected.

2. The Penalty/Forfeiture Statute

It is also suggested that Pennsylvania's one year limitations provision, 42 *Pa. C.S.A.* §5523(2) (Purdon, 1981), for actions "upon a statute for a civil penalty or forfeiture" pertains to litigation most analogous to that contemplated by RICO and for this reason ought to be adopted. Given Pennsylvania law on the issue, it is disingenuous to suggest such an analogy.

The civil penalty/forfeiture limitation provision has consistently been interpreted by the Pennsylvania courts in a narrow fashion to apply only to actions by private individuals which seek to enforce a penalty given by statute and not to actions which, in any sense, seek compensation for damages caused to an individual. *See Shapiro v. Paramount Film Distributing Corp.*, 274 F.2d 743, 745-46 (3d Cir. 1960); *Allegheny City v. McCluckin & Co.*, 14 Pa. 81 (1850); *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 146 A.2d 714 (1958). *Seller v. Spiegel, Inc.*, 551

F.Supp. 235, 237 (E.D. Pa. 1982). Thus, it forms an inappropriate analogue for actions such as those brought pursuant to the Clayton Act and RICO where proof of individual damages is an absolute prerequisite to recovery and, therefore, compensation of individual injury is a significant aim and result of the statutory scheme.[3] *See Sedima v. Imrex, supra*, 105 S.Ct. at 3285-86.

E. It is Appropriate to Analogize the RICO Cause of Action to Claims for Statutory Violations or for Fraud.

It will be recalled that the *Wilson* decision justified the characterization of Section 1983 civil rights claims as personal injury tort actions on two distinct bases. The first was a principle of statutory construction. Here, it was concluded that Congress "would have intended" to apply the limitations scheme for personal injuries because, at the time Section 1983 was enacted, it was directed primarily to redressing injuries to the person and that statutory claims for relief — the other available analogue under state law — were uncommon. The second basis for the *Wilson* characterization was a principle of federalism. Because of the prevalence of personal injury litigation in all of the states, it was found "most unlikely that the period of limitations applicable to such [civil rights claims] was or ever would be fixed in a way that would discriminate against federal claims or be inconsistent with federal law in any regard." *Wilson, supra*, 105 S.Ct. at 1949.

These same considerations of statutory construction and federalism support analogizing the RICO claim either to a statutory tort claim to which the state's residuary or catchall limitations provisions would apply or to an action for fraud.

3. Indeed, it was for this reason that the United States Court of Appeals for the Third Circuit expressly declined to apply Pennsylvania's civil penalty/forfeiture limitations period by analogy to an action arising in Pennsylvania under the Clayton Act, opting instead for Pennsylvania's residuary six year limitation provisions. *See Shapiro v. Paramount Film Distributing Corp., supra. See also; Bertha Building Corp. v. National Theatre Corp.*, 269 F.2d 785 (2d Cir. 1985) (declining to borrow civil penalty provisions to bar Clayton Act suit arising in New York and adopting six year statute). *See also: Wilson v. Garcia, supra*, n. 19 (citing these cases as a "correct" approach to the issue).

1. The Catchall Provision

What RICO expressly prohibits is the conduct of an enterprise through a pattern of racketeering activity which is expressly defined as a pattern of violations of specified state and federal statutes. 18 U.S.C. §1961(1)(5). This express language virtually compels the conclusion that Congress viewed the private damage section of RICO as affording a remedy for violation of statutory prescriptions. And, unlike the scarcity of statutory causes of action at the time Section 1983 was enacted, at the time Congress enacted the civil remedy provisions of RICO, the existence of statutory tort claims was quite common throughout the United States. Accordingly, under *Wilson's* statutory construction principles, it may fairly be presumed that Congress viewed the RICO action primarily as a statutory tort action to which the analogous "residuary" or "catchall" provisions of the state limitations law would apply. Moreover, as petitioners and Amici have observed these residuary limitations provisions are neutrally established with relatively long periods of limitation making it unlikely that they would be used to eviscerate the remedial thrust of the RICO legislation. Accordingly, the statutory tort analogy is the most appealing to use in RICO from a theoretical standpoint.

The specific objection made to borrowing Pennsylvania's residuary limitations provision, 42 *Pa. C.S.A.* §5527 (Purdon, 1981), is that it does not clearly apply to claims predicated on the violation of a statute. However, that is not an accurate depiction of Pennsylvania law. The courts charged with applying that law have consistently interpreted Section 5527 as a statutory catchall provision encompassing actions based on a statute that are not governed by a more specific period of limitation. *See, e.g., Webster v. Great American Insurance Co.*, 544 F.2d 609 (E.D. Pa. 1982).

The problem with characterizing the RICO claim as a statutory tort action is that a few states do not have limitations provisions which can fairly be characterized as statutory catchall

provisions.[4] This would preclude the kind of uniformity of characterization in all 50 states which was sought to be achieved for civil rights claims by this Court's *Wilson* decision and would leave the RICO limitations question in doubt in those states.

2. The Fraud Analogy

Such uncertainty, however, would not attach to a determination to analogize the RICO cause of action to a claim for fraud for all of the states have clearly defined periods of limitation which are applicable to that ancient trespass. We believe that this is the most appropriate characterization under the *Wilson* criteria.

First, although Congress defined the acts which might go to form a pattern of racketeering activity broadly to include a wide variety of criminal behavior ranging from murder and kidnapping to mail and wire fraud, it is likely that by confining private recovery to business and property injury that it anticipated that the remedy would be used, as in fact it has, primarily to recover for losses caused by fraudulent behavior. Under the reasoning of *Wilson*, then, the legislature would presumably have intended that the limitations periods applicable to fraud claims apply to RICO causes of action.

Second, the federalism criteria of *Wilson* also makes a fraud characterization most appropriate for the RICO cause of action. Fraud is an ancient form of action as to which all of the states have well-defined and long-standing periods of limitation. While

4. As amici PNB and Congress point out, roughly one-half of the states have "catchall" limitations provisions which expressly apply to statutory violations not otherwise limited. The rest have residuary provisions which apply more broadly to all claims not otherwise provided for. Presumably, many of these broad residuary limitations statutes will also apply to statutorily created claims for relief which are not otherwise limited. Notably, eight of the thirteen states cited by Congress and PNB as having broad residuary limitations provisions of ten years or more also have separate statutory catchall provisions with significantly shorter periods of limitations. Thus, the problem of creating overly long periods of limitation for RICO claims by borrowing the statutory omnibus limitations provisions of the states which is prophesied by PNB and Congress is largely fanciful.

actions predicated on fraud are not as common in number as personal injury suits, they are nevertheless a frequent subject of litigation in state courts. These circumstances no doubt make it highly unlikely that state legislatures would establish fraud limitations periods in a way which will have an untoward affect on the RICO civil damage remedy.

Finally, there is a third consideration which makes fraud the appropriate analogue for RICO claims and that is the reality of RICO litigation. As *Wilson* recognized, the heart of the federal limitations borrowing process is the thesis that "[b]y adopting the statute governing an analogous cause of action under state law, federal law incorporates the state's judgment on the proper balance between the policies of repose and the substantative policies of enforcement embodied in the state cause of action." *Wilson, supra*, 105 S.Ct. at 1945. As petitioners, amici and this Court have recognized, most of the litigation brought under RICO involves misrepresentations of one kind or another. *See Sedima v. Imrex, Supra*, 105 S.Ct. at n. 16; Brief Amici Curiae for Congress and PNB at pp. 20-21. Given that overriding reality, it would seem that the state's judgment on the repose to which fraudulent action is entitled represents the best available judgment on the vast majority of RICO litigation which the courts will confront. Indeed, with the amount of RICO litigation which is predicated on fraud theories, it seems almost absurd to suggest that some period of limitations pertaining to non-fraudulent behavior ought to govern RICO litigation.[5]

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5. Amici, Congress and PNB, note that many claims under RICO involve instances of oral misrepresentation and that the states, perceiving a problem with proving such claims at a great distance in time have provided shorter periods of limitation for such fraud claims. If that is so, it justifies applying the period of limitation for fraud and not the illogical leap which they suggest to apply the altogether different repose judgments embodied in the statutes pertaining to civil penalty and forfeiture actions.

IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals ought to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Michael D. Fishbein, a member of the bar of the Supreme Court of the United States, hereby certifies that on February 17, 1987 he caused three copies of the Brief Amici Curiae for A.J. Cunningham Packing Corp., Chicago Dressed Beef Co. Inc., Continental Food Products, Inc., Florence Beef Company and Pierce Trading Company in Support of Respondent to be served upon each of the following attorneys for Petitioners and Respondent herein by first class mail, postage prepaid, addressed as indicated: Robert L. Frantz, Counsel of Record for Petitioners in No. 86-497, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219, John H. Bingler, Jr., Counsel of Record for Petitioner in No. 86-531, 1 Riverfront Center, Pittsburgh, PA 15222, and H. Woodruff Turner, Counsel of Record for Respondent in Nos. 86-497 and 86-531, 1500 Oliver Building, Pittsburgh, PA 15222. All parties required to be served have been served.

/s/ Michael D. Fishbein,
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